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CASE NBR 86-1-07066 CSY
SHORT TITLE Muehleman, Jeffrey A. DOCKETED: May 21 1987
VERSUS Florida

Date	Proceedings and Orders
May 21 1987	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Jul 10 1987	Brief of respondent Florida in opposition filed.
Jul 16 1987	DISTRIBUTED. September 28, 1987
Oct 5 1987	The petition for a writ of certiorari is denied. Justice Brennan, dissenting: Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case. Dissenting opinion by Justice Marshall. (Detached opinion.)

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PETITION FOR WRIT OF CERTIORARI

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Case No.

IN THE

SUPREME COURT OF THE UNITED STATES

86-7066

JEFFREY ALLEN MUEHLEMAN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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Supreme Court, U.S.
FILED
MAY 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

QUESTION PRESENTED

Whether, after an accused has made incriminating statements to a cellmate, the employment by the State of the cellmate as its agent to obtain further incriminating statements from the accused and record them with a concealed electronic device violates rights guaranteed under the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States?

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OPINION BELOW

The opinion and judgment of the Supreme Court of Florida sought to be reviewed via this petition is reported at 503 So.2d 310, and is reproduced in the appendix to this petition. (A 1-17).[1/]

JURISDICTION OF THE SUPREME COURT

The Supreme Court of Florida issued its opinion in this cause on January 8, 1987. (A 1) Petitioner filed a motion for rehearing, which was denied on March 27, 1987. (A 18) Petitioner asserted below and asserts here a deprivation of his rights guaranteed under the Constitution of the United States. Title 28, United States Code, Section 1257(3) and Rule 17 of the United States Supreme Court Rules provide for certiorari jurisdiction in this Court to review this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment V. to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Amendment VI. to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

1/ References in this petition to the record on appeal that was before the Supreme Court of Florida are designated by an "R" followed by the appropriate page number. References to the Appendix to this petition are designated by an "A" followed by the page number.

3. Amendment XIV., Section 1. to the Constitution of the United States:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

When he was 18 years old Petitioner, Jeffrey Allen Muehleman, left his home in Illinois and went to Florida to start over. (R 1076-1077)

On May 2, 1983, 97 year old Earl Baughman hired Petitioner as a "helper." (R 649-650,659,665,672-673) The following day Muehleman took Baughman and Baughman's friend, Virginia Peterson, to the grocery store. (R 651) On May 4 Muehleman took Baughman and Peterson to the bank so that they could cash their social security checks. (R 651-652) Baughman had a check for $426, as well as a personal check for $100. (R 652)

On May 5, Earl Baughman and his 1961 Cadillac turned up missing. (R 656,658,668)

Petitioner was arrested by Pinellas County, Florida, sheriff's deputies the next day. (R 709-710) The deputies had no warrant, and did not feel they had probable cause to arrest Petitioner on any charges relating to Baughman's disappearance, but did feel they had sufficient cause to detain Petitioner and have him answer some of the questions they had regarding the disappearance. (R 590-591,612-613) Petitioner was actually arrested, however, for "obstructing by false information," because he told the deputy who initially detained him his name was "Ed Buchanan." (R 582-583)[2/]

2/ The statute pursuant to which Petitioner was arrested, section 843.035 of the Florida Statutes, was later declared unconstitutional by the Supreme Court of Florida in Bunnell v. State, 453 So.2d 808 (Fla.1984).

Deputy Sheriff John Daniels read Petitioner his Miranda rights,[3/] and Petitioner agreed to talk. (R 597,681) Petitioner gave Daniels his true name. (R 598,681) Petitioner said that he last saw Earl Baughman on May 4 at around 10:00 p.m. when he left him. At that time Baughman was fine. (R 598,681,781) Petitioner denied any involvement in Baughman's disappearance. (R 598,681,781) He did admit taking a cigarette lighter, some cosmetics, and other small items without Baughman's permission. (R 600,682,782)

Petitioner invoked his right to remain silent on May 9. (R 568, A 3)

On May 14, 1983 Earl Baughman's decomposed body was found in the trunk of his Cadillac on a St. Petersburg, Florida street. (R 716,720,785) Asphyxiation was the cause of his death. (R 724)

After Baughman's body was found, on May 17 Deputies Ron Beymer and John Halliday interviewed Petitioner at the maximum security county jail facility. (R 785,788) Petitioner continued to deny his involvement in Baughman's killing. (R 841) However, Beymer noticed some inconsistencies with Petitioner's earlier statements. (R 791-793)

During the May 17 interview Beymer fed Petitioner false information about finding gloveprints in the trunk of Baughman's car. (R 834)

On May 18 Petitioner requested that Detective Halliday return to the jail by himself for another interview. (R 795,841) During that interview Petitioner continued to deny his involvement in Baughman's disappearance, and said he would beat the charge if he was charged with the murder. (R 842)

While he was in the Pinellas County Jail, Petitioner came into contact with an eight-time convicted felon named Ronald Rewis. (R 734-736,758) Jail personnel placed Petitioner in the laundry on C-Wing to work with Rewis, who was working with Detective Halliday. (R 410

3/ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Although Rewis told Petitioner he was not interested in hearing about it, Petitioner discussed his case with Rewis on four or five occasions. (R 738,745-746,755) According to Rewis, Petitioner confessed to killing Baughman. Petitioner told Rewis he decided to rob and kill the old man on the afternoon of May 4. (R 738-739) Petitioner had discussed doing the crimes with another man, but he did not show up. (R 739) Petitioner first set out two cups and some bread crumbs on the table so that if someone checked the next morning, it would look as if he and Baughman had eaten breakfast and gone for a ride in the car. (R 742-743) He also wiped down items inside the house from which his fingerprints could be taken. (R739) Petitioner then took a frying pan off the stove, entered Baughman's bedroom where he was sleeping, and hit him with it, opening Baughman's head. (R 739, 742) Petitioner told Rewis the pan made a "gong" sound, and laughed about that. (R 739) The blow with the pan did not knock Baughman out, and so Petitioner tried to strangle him with his hands. (R 739) This was unsuccessful because the windpipe was very flexible. (R 739-740) Petitioner then took the plastic wrapper from a newspaper and stuck it down the man's throat. (R 740) He laughed when he told Rewis this. (R 740) The plastic bag was bubbling in and out. (R740-741) Petitioner took about $150 from Baughman, wrapped his body in the bedcovers, and put him in the car trunk. (R 741-742) He returned to the house and began looking for more money. (R 741) He took a hot water bottle and other items that had blood on them from the bed and burned them in back of the house. (R 742) He then returned to a garage apartment in which he had been staying, where he hid the money and dropped off some tapes he had taken from the house. (R 742,744) From there he drove to some apartments where he parked Baughman's car and "wiped it down." (R 744) He had breakfast, returned to his garage apartment, and went to bed. (R 744)

After Rewis heard details of the crime from Petitioner, he alerted Detention Officer Jacobs, who put him in touch with the detectives. (R 745-746) They asked Rewis to let them know if Petitioner

said anything else, and asked Rewis if he was willing to try to get a tape of what Petitioner had been telling him. (R 746,757) Rewis said he was willing to be "bugged," and the detectives equipped him with a tape recorder monitoring device, which was concealed in the front of his jail uniform. (R 747-748) Rewis did in fact tape a conversation with Petitioner in the recreation yard. (R 746-747) On the tape Rewis asked Petitioner why he did not merely take the old man's money, to which Petitioner responded that he had intentions of killing the man to start with. (R 748) When Rewis asked Petitioner whether the killing bothered him, he said "no," and laughed about it. (R 748)

On approximately three occasions Officer Jacobs called the sheriff's deputies to relay information which Rewis had gotten from Petitioner. (R 796) In this way the detectives learned on May 18 that Petitioner was worried after they fed him the false information on the 17th concerning fabric marks being found in Baughman's car. (R 834,856) This is also how they learned that money was still hidden in the garage apartment, and where it was located. (R 797-799) Rewis similarly provided them with information that another subject was involved in the planning of the crime, that Baughman had been struck on the head with an unknown object, and that there was blood on the bed that Petitioner had hidden. (R 801,856-857) Rewis also conveyed information to them about a coffee cup and crumbs or items being strewn about Baughman's kitchen. (R 800)

Detective Beymer interviewed Rewis on May 31, 1983, and learned for the first time that a frying pan was used to hit the victim and that something might have been burned in a barrel in Baughman's back yard. (R 796-797,817) He took a taped statement from Rewis on June 7. (R 806)

Ronald Rewis had given Officer Jacobs information about other inmates on C-Wing on one other occasion. (R 863) He had also provided information to another correctional officer relating to a planned escape attempt by two inmates. (R 772,863-864,943)

On April 21, 1983, Rewis had pled guilty to felonious

possession of a firearm. (R 461-462,760,943) The prosecutor had recommended that he be sentenced to five years in prison. (R 943) Although no promises were made to Rewis regarding his sentence, in the back of his mind he thought he might get some help in this regard. (R 750) And Detective Beymer did agree to be available for the sentencing hearing. (R 808-809) When Rewis was finally sentenced on March 2, 1984, he received five years' probation, with a year of specified residency in the county jail (credit for 201 days already served) and two years community control. (R 461-462)

Detectives Beymer and Halliday interviewed Petitioner again on June 8, 1983, at his request. (R 812,843) He initially denied his involvement in the crime once again. (R 813) But then the detectives confronted him with the evidence they had amassed against him, including the fact that they had received information from Ronald Rewis, and that Rewis had worn a body bug. (R 814,844) Petitioner finally admitted killing Baughman, and gave a detailed statement. (R 352-360, 814,844) He said he killed the old man because he hated him and knew he had obtained $500 at the bank. (R 814) The man was grumpy, would not bathe, and urinated on himself. (R 815) Petitioner was homesick and needed money to fly home. (R 814) He initially struck Baughman with a small frying pan about six times, and took $145 or $153 from his wallet and pockets. (R 815,819) He then tried to strangle him with his hands for several minutes. (R 816) Baughman was still breathing, and so he pushed a plastic bag down his throat. (R 816-817) He could see the bag beginning to inflate, and so he pushed it further down the throat. (R 817) A few minutes later Baughman had expired, and Petitioner wrapped him in a blanket. (R 817) He cleaned up the residence and burned some items that had blood on them, as well as Baughman's wallet and identification, in the back yard. (R 817)

It was unclear when Petitioner actually made the decision to kill Baughman. (R 846-847) He initially told the detectives he had planned on doing "it" for two or three hours. (R 816) But when he confessed on tape, he said he did not plan to kill him, but only

to knock him out. (R 355) He only killed him to keep him from suffering when he realized he had probably caused Baughman brain damage. (R 353,355)

It was on June 8 that Petitioner was formally booked on first degree murder charges. (R 854)

On June 10 Petitioner gave his final statement to Detectives Halliday and Beymer. (R 362-364,845-846) He again stated that he initially intended only to knock Baughman unconscious and take his money. (R 363) But after being struck with the frying pan a few times, Baughman said, "Oh, Jeff," and reminded Petitioner of his grandfather. (R 363) At that point Petitioner felt he had to put Baughman out of his misery, and not leave him brain-damaged or otherwise handicapped. (R 363-364)

Petitioner moved to suppress all statements he had made, including those made to Ronald Rewis, and to suppress certain physical evidence as the fruit of his illegal arrest. (R 225-231) The motion was heard on May 1, 1984. (R547-631) At the hearing the prosecutor conceded that Ronald Rewis was functioning as a state agent at the time he wore the body "bug" to obtain incriminating evidence against Petitioner. (R 566, A 23) The court denied the motion to suppress. (R 232,620)

Immediately thereafter, Petitioner entered a plea of guilty to the murder charge. (R 631-642)

A penalty trial before a jury was conducted on May 2-6, 1984. (R643-1259,2230-2551) Before penalty phase testimony began, Petitioner lodged a continuing objection to any evidence he had sought to suppress. (R 2417-2418) The statements Petitioner made to Ronald Rewis were introduced into evidence by the prosecution, including tapes of the conversation in the recreation yard when Rewis wore the body "bug." (R 738-745,746-749,1229-1231) During his closing argument to the jury the prosecutor played a portion of the tapes and argued that Petitioner's laughter thereon was a reason why he should be sentenced to death. (R 2502-2503)

Petitioner's penalty phase evidence focused upon his troubled upbringing, which included a host of physical ailments and psychological problems. (R 862-1222)

By a vote of 10 to two, the jury recommended that Petitioner be sentenced to death. (R 304,1254)

On June 8, 1984, the trial court sentenced Petitioner to die in the electric chair. (R 307-308,1340) In support of the death sentence the court found four aggravating circumstances to be present. (R 309-315,A 25-31) He found Petitioner's age of 18 to constitute a statutory mitigating factor under Florida's death penalty statute. (R 315,A 31) The court cited the fact that Petitioner pled guilty as being "probably the most mitigating factor." (R 1340) He also recognized that Petitioner's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired, but did not find this impairment to be "substantial" enough to qualify as a statutory mitigating circumstance. (R 314-315,A 30-31)

One of the issues Petitioner raised on direct appeal to the Supreme Court of Florida was that the State's employment of Ronald Rewis as its agent to obtain and record incriminating statements from Petitioner violated his constitutional rights to counsel and to remain silent. The Court did not address Petitioner's claim that his right not to incriminate himself had been violated, but did find no violation of Petitioner's right to counsel. (A 6-7)

REASONS FOR GRANTING THE WRIT

Petitioner's rights under the federal constitution were violated by the State's use of Ronald Rewis as its agent to obtain and record incriminating statements from Petitioner. At least at the point where Rewis was wired with a concealed electronic device and sent to engage Petitioner in conversation about the murder of Earl Baughman, Rewis was fully functioning as a surreptitious State operative, a fact the State conceded before the trial court.

In United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), the Respondent had been arrested and charged

with bank robbery. A government agent contacted an inmate named Nichols, who informed the agent that he was housed in the same cellblock with several federal prisoners awaiting trial, including Henry. The agent told Nichols to be alert to any statements made by these prisoners, but not to initiate any conversations with Henry about the bank robbery, or question him about it. Nichols and Henry thereafter did engage in conversations during which Henry told Nichols about the robbery. Nichols was paid for providing the authorities with this information.

This Court held the foregoing scenario violative of the Respondent's Sixth Amendment right to counsel. The government had circumvented Henry's rights "[b]y intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel." 65 L.Ed.2d at 125.

Five years later the Court applied the principles expressed in Henry in a somewhat different factual context in Maine v. Moulton, 474 U.S.__,106 S.Ct. 477, 88 L.Ed.2d 481 (1985). Moulton and Colson were indicted for four counts of "theft by receiving" after police discovered evidence of automobile and automobile-related thefts in a building the men were leasing. They were released on bail pending trial. At a breakfast meeting during which the two men discussed their case, Moulton suggested killing a State's witness, and he and Colson talked about how to commit the murder. Shortly thereafter Colson went to the authorities with his lawyer and fully confessed to his participation with Moulton in the crimes with which they had already been charged, as well as other crimes. The State struck a deal with Colson in which no further charges would be brought against him if he agreed to testify against Moulton and otherwise cooperate in the investigation of Moulton on the pending charges. (Additionally, after Moulton's trial, Colson pled guilty to two of the four theft counts, and received a very light sentence.) In conjunction with this arrangement with the State, Colson agreed to allow a recording device to be placed on his telephone. He recorded three calls from Moulton, none of them incriminatory. During the third conversation,

at Moulton's suggestion the two men agreed to meet on a certain day to plan their defense. After learning of the scheduled meeting the police obtained Colson's consent to be equipped with a body wire transmitter to record what took place. (Ostensibly, the reason for wiring Colson was for his own protection in case Moulton realized he was cooperating with the police, and to gather information concerning any further threats against witnesses, not to obtain evidence regarding the pending theft charges.) The police instructed Colson not to try to question Moulton, but just to be himself. During the course of the meeting Moulton did make incriminating statements, some of which came in response to Colson's questioning of Moulton under the guise of refreshing Colson's memory as to events that had occurred. After Colson's role as an informant was revealed to Moulton, the State had the pending theft indictments against Moulton dismissed, and obtained new indictments for the original theft offenses, as well as new charges. Some of the charges were disposed of by plea or dismissal. At Moulton's nonjury trial on the remaining charges, portions of the tape recording of his meeting with Colson were admitted into evidence.

This Court held Moulton's Sixth Amendment right to counsel to have been violated by the stratagem the police employed in wiring their informant for sound when they "knew that Moulton would make statements that he had a constitutional right not to make to their agent prior to consulting with counsel." 88 L.Ed.2d at 497.

In rejecting Petitioner Jeff Muehleman's contention that Henry and Moulton applied to his case so as to render his statements to Ronald Rewis inadmissible, the Florida Supreme Court relied upon four factors: (1) Petitioner approached Rewis to discuss his case. (2) Rewis approached the authorities on his own initiative. (3) Rewis was at first instructed not to initiate any conversation with Petitioner. (4) Rewis' efforts were not induced by any promises of any form of compensation. (A 6-7)

The fact that Petitioner may have initially approached Rewis, rather than Rewis having approached Petitioner, is essentially irrelevant. In Moulton, it was Moulton who made the call to Colson and

suggested an all-day meeting where the two men could discuss their case. In fact, in Moulton this Court viewed Moulton's willingness to talk as weighing against the State's position; the fact the police knew Moulton would talk about his case at the meeting with Colson showed the deliberate nature of the State's circumvention of his right to counsel. Similarly, here the fact that Petitioner had spoken to Rewis about his case in the past showed the sheriff's department that Petitioner was vulnerable, a ripe subject for them to exploit by recording incriminating statements with no attorney present. Furthermore, it is clear that it was Rewis who sought out Petitioner when the time came to tape record Petitioner's inculpatory statements.

With regard to the fact that Rewis approached the authorities on his own initiative, this first must be placed in context. Rewis had previously given Detention Officer Jacobs information about other inmates incarcerated on a particular wing of the jail, and had provided information to another correctional officer relating to a planned escape attempt by two inmates. He was accustomed to working hand-in-glove with the authorities, and they undoubtedly expected him to come to them whenever he had information they could use. Also, whether Rewis first approached the authorities, or vice versa, has little relevance. In Moulton, it was Colson who initially approached the police to make a confession. While he may not have been the first to suggest a deal, it appears certain that he was hoping for one to reduce his criminal liability. And, again, it was the authorities, not Rewis, who suggested that he be wired with the body "bug" and try to record Petitioner on tape.

That Rewis initially was instructed not to initiate any conversations with Petitioner has no relevance to whether the tape of the conversation in the courtyard was suppressible; at the point the sheriff's deputies outfitted Rewis with the electronic device they clearly expected him to initiate a conversation with Petitioner regarding the Baughman disappearance and "get in on tape."

Finally, with regard to the compensation issue, the contingent-fee arrangement Nichols had in Henry was only one factor in the way this

Court decided the case. In Moulton the informant received no monetary compensation whatsoever. Here Ronald Rewis was hoping for compensation from the State in return for his cooperation in Petitioner's case in the form of a lesser sentence on the charge of felonious possession of a firearm to which he had already pled guilty , but for which he had yet to be sentenced. And he did in fact receive a much lighter sentence than the prosecutor had been recommending prior to Rewis' cooperation with the sheriff's department. Rewis had eight felony convictions and had worked with law enforcement as an informant in the past; he thus was in a position to know that he could expect favorable treatment if he provided the State with information useful to them in a major criminal prosecution.

This is not a case such as Kuhlmann v. Wilson, 477 U.S.__, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986), in which the jailhouse informant played essentially a passive role as a "listening post"; Ronald Rewis clearly engaged in active questioning of Petitioner designed to elicit the damaging remarks and laughter that were secretly recorded in the jail courtyard.

In the instant case, as in Henry, Rewis "deliberately used his position to secure incriminating information from [Petitioner] when counsel was not present...." 65 L.Ed.2d at 122. And here, as in Henry, the government informant built up a relationship of trust with his fellow inmate, stemming from their shared plight of incarceration, that enabled the agent to obtain inculpatory statements.4/

The statements gathered by Rewis were extremely damaging to Petitioner. It was not until sheriff's deputies confronted Petitioner with the evidence they had amassed against him, notably the fact that Rewis was working as a state operative and had recorded Petitioner on tape, that Petitioner confessed to law enforcement authorities; before then his statements to them had been exculpatory. Knowing his admissions

4/ That Petitioner came to trust Ronald Rewis is clearly reflected in the record of this case. Petitioner told Rewis directly that he felt he could trust him immediately before Petitioner made his first admissions regarding Earl Baughman's murder. (R 738)

to Rewis were preserved on tape must have served as a powerful incentive for Petitioner to confess. At that point he had little left to lose.

Unlike in Wilson, the sheriff's deputies did not have "solid evidence," 91 L.Ed.2d at 385, that Petitioner was responsible for Earl Baughman's death prior to his statements to Rewis and subsequent confessions to the detectives.

The prosecutor employed the tape of the conversation in the courtyard for dramatic effect by playing a portion thereof at the end of his penalty phase argument to the jury and urging them to sentence Petitioner to death on the basis of his laughter on the tape. And Petitioner's confessions were the primary source of the trial court's factual recitation in his written order in support of the death sentence relative to the manner in which Earl Baughman was killed and the surrounding circumstances.

Ronald Rewis was, in effect, functioning as a surrogate detective for the Pinellas County Sheriff's Department. Pursuant to the Henry and Moulton decisions, the confessions he garnered in this capacity, in particular the tape recording of the courtyard conversation, should have been suppressed.

Although Moulton and Henry are couched in terms of the Sixth Amendment right to counsel, Petitioner submits that the Fifth Amendment privilege not to incriminate oneself is also implicated where, as here, the State deliberately pursues a course of conduct which is designed to, and which does, cause one who is incarcerated to give up his right to remain silent, with no procedural safeguards to assure that the relinquishment of the right is made knowingly, voluntarily, and intelligently.

CONCLUSION

Upon the authorities and reasons presented in this petition, Petitioner, Jeffrey Allen Muehleman, prays this Honorable Court to issue a writ of certiorari to the Supreme Court of Florida.

APPENDIX

ITEM:		PAGE NO.
1.	Florida Supreme Court opinion in Muehleman v. State	A 1-17
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3.	Excerpt from transcript of pretrial suppression hearing, held on May 1, 1984	A 19-24
4.	Trial court's written order in support of sentence of death	A 25-31

Supreme Court of Florida

No. 65,546

JEFFREY ALLEN MUEHLEMAN, Appellant,

v.

STATE OF FLORIDA, Appellee.

Received By
JAN 13 1987
Appellate Division
Public Defenders Office

[January 8, 1987]

ADKINS, J.

Jeffrey Allen Muehleman, convicted of first-degree murder pursuant to a plea of guilt and sentenced to death, appeals his conviction and sentence. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm both.

The testimony and evidence before the trial court established the following scenario. Muehleman, identifying himself as Jeff Williams, was hired by the victim, 97-year-old Earl Baughman, as a "helper" on May 2, 1983. By the afternoon of May 4, he had decided to kill and rob the victim, and sought to enlist the aid of an acquaintance in committing the robbery and disposing of the body. Because the acquaintance did not show, Muehleman committed the brutal murder by himself on the evening of May 4.

He began that evening by placing on the kitchen table two almost-empty coffee cups and some bread crumbs in order to create an appearance the next morning that he and the victim had eaten breakfast and gone for a ride in the victim's car. He then wiped down the apartment in order to remove his fingerprints, grabbed a cast iron frying pan, and crept into the bedroom where the victim lay sleeping. With the frying pan, he repeatedly struck the

victim's head with sufficient force to send flying the man's dentures and splatter the bed linens, walls and curtains with blood.

Muehleman then attempted to strangle the elderly man, but found his neck too flexible to successfully restrict the flow of blood to his brain. In a later statement, Muehleman indicated that the victim at this point lay helpless, staring up into the murderer's face, and remained conscious enough to beg for mercy, muttering words to the effect of "Jeff, oh, Jeff . . ." No mercy was forthcoming. Muehleman proceeded to remove the plastic wrappers from two newspapers and shoved them into the victim's throat. Frustrated when the plastic bags continued to bubble in and out with the victim's weakening breath, he pushed the suffocating plastic mass deeper.

He then stole $150 from the victim, wrapped the body in the bloodied bedcovers, and placed it in the trunk of the victim's 1961 Cadillac. After stopping by the garage in which he was staying to stow the cash and other personal objects he had stolen, he returned to the victim's residence and burned some of the blood-covered linens and the victim's identification in a barrel in the backyard. He then wiped down the car for fingerprints, drove it to a nearby apartment complex, and abandoned the vehicle.

The disappearance of the victim, along with his car, immediately aroused suspicion because he did not drive. On May 6, a witness called the police and informed them that he had seen the victim's early model Cadillac, described in a broadcast, parked in front of the garage in which Muehleman had been residing. A police officer was dispatched to that address to question Muehleman. Upon arriving at the address, the officer was informed that Muehleman had borrowed a bicycle and would be returning shortly. The police left the residence, and within thirty seconds spotted Muehleman.

When Muehleman saw the police car, he covered his face with his arm, looked up, jumped off the bicycle and turned around. Before he could run, the officer grabbed his arm and

asked him his name, and he responded "Ed Buchanan." When the witness positively identified him as "Jeff," Muehleman was arrested on charges of obstructing justice by providing false information, a first-degree misdemeanor under section 843.03, Florida Statutes (1983). Muehleman was read the Miranda warnings and agreed to talk. Denying any involvement in the victim's disappearance, Muehleman indicated that he had taken a monogrammed cigarette lighter and some other small objects belonging to the victim without permission.

On May 9, Muehleman invoked his right to remain silent. Five days later, the decomposing body was discovered in the trunk of the parked car. While Muehleman continued to protest the charges in interviews with police authorities, he approached a fellow inmate and began to discuss with him details of the killing. The inmate, Ronald Rewis, eventually approached authorities and agreed to surreptitiously record incriminating conversations with Muehleman.

On June 8, 1983, Muehleman requested an interview with authorities. During this interview, he was informed of the evidence which had been gathered against him and confessed in some detail. That day, Muehleman was formally booked on first-degree murder charges. A final statement was given on June 10 concerning additional details of the crime.

Muehleman subsequently moved to suppress the statements he had made and the physical evidence obtained against him, alleging several violations of his constitutional rights. When these motions were denied, he pled guilty. Following his sentencing hearing, the jury recommended by a vote of ten to two that Muehleman be sentenced to death. Finding four aggravating and two mitigating circumstances, the trial court followed the jury's recommendation.

Muehleman urges a number of grounds in support of his claim that his conviction and sentence should be vacated, or alternatively that he receive a new penalty trial.

We first note that the statutory provision that "[a] defendant who pleads guilty . . . with no express reservation of

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the right to appeal shall have no right to a direct appeal," section 924.06(3), Florida Statutes (1985); Fla. R. App. P. 9.140(b), has no application in the context of capital review. In entering his plea of guilt, Muehleman answered the following question from the court as follows:

> Q: You also give up the right to appeal any error that may have been committed thus far in the proceedings, you understand that?
>
> A: Yes, sir.

Nevertheless, we follow the mandate of section 921.141(4), Florida Statutes (1985), that "[t]he judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida," and turn to an examination of the alleged errors now raised.

First, it is argued that the trial court committed reversible error in refusing to suppress evidence allegedly obtained in violation of Muehleman's fourth, fifth and sixth amendment rights. These contentions shall be examined in order.

Muehleman contends, initially, that his fourth amendment rights were violated first by an illegal arrest and later by some illegal searches of the garage in which he was temporarily residing. We reject both contentions. First, the officer acted properly in effecting the initial stop of Muehleman. The stop was amply justified by "specific and articulable facts . . . taken together with rational inferences from these facts." State v. Webb, 398 So.2d 820, 822 (Fla. 1981) (applying Terry v. Ohio, 392 U.S. 1 (1968)). The elderly victim had disappeared along with his car, and he did not drive. His housekeeper of two days had similarly disappeared. A BOLO had been issued the day before, and a reputable citizen had contacted the police and linked Muehleman to the incident through the victim's distinctive automobile. In light of Muehleman's furtive behavior and apparent attempt to flee, the officer's suspicion was eminently reasonable and he acted properly in detaining the suspect for the purpose of ascertaining his identity. § 901.151(2), Fla. Stat. (1983); State v. Cook, 475 So.2d 285 (Fla. 5th DCA 1985).

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When the suspect falsely identified himself as Ed Buchanan, and an apparently reliable witness identified him as "Jeff," the officer had probable cause to arrest Muehleman on the first-degree misdemeanor charge of "obstructing justice by false information" under section 843.05, Florida Statutes (1983). This Court's subsequent invalidation of the statute in Bunnell v. State, 453 So.2d 808 (Fla. 1984), does not render the earlier arrest invalid. Michigan v. DeFillipo, 443 U.S. 31 (1979). We therefore find the initial detention and arrest lawful. See State v. Stevens, 421 So.2d 41 (Fla. 3d DCA 1982).

Muehleman's second fourth amendment claim involves three warrantless searches of the garage in which he had temporarily resided. His initial argument, that the search was tainted by the illegal arrest, United States v. Robinson, 625 F.2d 1211 (5th Cir. 1980); Norman v. State, 379 So.2d 643 (Fla. 1980), must fall in light of our disposition of the first issue.

Even acknowledging that Muehleman may have had a "reasonable expectation of privacy" in the garage, we find that under these circumstances the state has met its burden of establishing the validity of his consent to the initial search. Raffield v. State, 351 So.2d 945 (Fla. 1977). Further, we find that on these facts the consent given by the property's owners to two later searches was properly obtained. The owners had merely allowed Muehleman to temporarily sleep in the garage, which was not an apartment; the owners continued to use the garage for storage. A highly informal rent agreement was reached and the owners' continued access to the garage remained unquestioned. Because these circumstances leave little doubt as to the owners' capacity to validly consent to the search, Preston v. State, 444 So.2d 939 (Fla. 1984); Silva v. State, 344 So.2d 559 (Fla. 1977), we reject Muehleman's second fourth amendment claim.

Muehleman next contends that his fifth amendment privilege against self-incrimination was violated in the course of four interviews conducted by the police after he had invoked his right to silence on May 9. The facts of the case do not support this contention. As noted by the United States Supreme Court in

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Michigan v. Mosley, 423 U.S. 96, 102-03 (1975), Miranda cannot "sensibly be read to create a per se proscription of indefinite duration upon any further questioning by any police officer . . . once the person in custody has indicated a desire to remain silent."

The first interview complained of was conducted eight days after his invocation of his right to silence on May 17. Clearly, the authorities had scrupulously honored Muehleman's "right to cut off questioning" as mandated by Mosley. No contention is made that this interview was not conducted in full accordance with Miranda; it was in fact conducted pursuant to the obtaining of a written waiver. The later interviews not only followed the signing of written waivers, but were initiated by Muehleman. We decline to depart from our holding, soundly based in sensible fifth amendment jurisprudence, that "[t]he law does accord [a suspect] the opportunity to voluntarily change his mind and confess." Witt v. State, 342 So.2d 497, 500 (Fla.), cert. denied, 434 U.S. 935 (1977); Cannady v. State, 427 So.2d 723 (Fla. 1983).

Muehleman's next claim involves an alleged violation of his sixth amendment right to counsel. He contends that fellow inmate Ronald Rewis became a state agent for the impermissible purpose of acquiring incriminating evidence which properly lay beyond the state's reach. Maine v. Moulton, 106 S.Ct. 477 (1985); United States v. Henry, 447 U.S. 264 (1980). We find in this case no violation of Muehleman's sixth amendment rights, as a review of the facts discloses that his incriminating admissions were not a product of a "'stratagem deliberately designed to elicit an incriminating statement.'" Miller v. State, 415 So.2d 1262, 1263 (Fla. 1982), cert. denied, 459 U.S. 1158 (1983) (quoting Malone v. State, 390 So.2d 338, 339 (Fla. 1980), cert. denied, 450 U.S. 1034 (1981)).

First, Muehleman, apparently eager to talk, approached Rewis and began to repeatedly attempt to discuss details of the crime with him. Second, after unsuccessfully attempting to dissuade Muehleman from "talking too much," Rewis approached the

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authorities on his own initiative. Bottoson v. State, 443 So.2d 962 (Fla. 1983), cert. denied, 105 S.Ct. 223 (1984); Barfield v. State, 402 So.2d 377 (Fla. 1981). Third, Rewis was at that point instructed not to initiate any conversations with the suspect. Finally, no evidence exists in the record that Rewis' efforts were induced by promises of any form of compensation. The contingent fee arrangement reflecting an improper relationship between police and informant in Henry is absent in this case.

In light of these circumstances, we cannot say that the authorities' eventual use of a tape recording device, wired to Rewis to record information which had been offered freely by Muehleman and previously reported by Rewis, itself violated Muehleman's sixth amendment rights. We find, as did the trial court, that the mere use of the tape recorder did not establish the more central question of whether the statements were deliberately elicited by Rewis acting in an unlawful capacity as an agent of the state. In this case, marked by Muehleman's penchant for loose talk and Rewis' turning to the authorities on his own initiative, we cannot find that the use of the tape recording device transformed these facts into a violation of Muehleman's right to counsel.

Muehleman's next issue on appeal turns on our disposition of the above constitutional claims. Based on his contention that his plea, and resulting conviction and sentence, were bottomed on inadmissible evidence, he argues that his conviction and sentence must now be vacated. Anderson v. State, 430 So.2d 574 (Fla. 1982).

As we have rejected his claims as to the admissibility of the evidence, we likewise reject the instant claim. In fact, having carefully reviewed the record, we find Muehleman's plea of guilty to charges of first-degree murder to have been freely and voluntarily given and amply supported by a factual basis in the record. LeDuc v. State, 365 So.2d 149 (Fla. 1978), cert. denied, 444 U.S. 885 (1979); § 921.141(4), Fla. Stat. (1983); Fla. R. App. P. 9.140(f).

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In his third issue on appeal, Muehleman argues that his absence from the courtroom during a pre-trial suppression hearing and the later jury charge conference violated his sixth amendment right of confrontation and his fourth amendment due process rights. We do not agree.

First, the voluntariness of his absence at both phases of the proceedings renders inapplicable such precedent as Francis v. State, 413 So.2d 1175 (Fla. 1982). Second, this suppression hearing was not a crucial stage of the trial, "where fundamental fairness might be thwarted by his absence." Herzog v. State, 439 So.2d 1372, 1375 (Fla. 1983) (quoting Francis, 413 So.2d at 1177). A capital defendant may waive his presence at a crucial state of the proceedings, Peede v. State, 474 So.2d 808 (Fla. 1985), and should therefore a fortiori be free to waive his right to be present at a non-crucial stage.

The waiver through counsel of Muehleman's right to attend the jury charge conference was given as follows:

> . . . Your Honor, I have consulted with Jeff and it has been a long case, a long week for him. He's waiving his presence to be present during the jury instruction conference that we are holding at this time. He requested to be sent back to the facility at this time.

Muehleman's obvious participation in this waiver represents more than the mere acquiescence in and knowledge of counsel's request which has been found sufficient in Amazon v. State, 487 So.2d 8 (Fla. 1986), and State v. Melendez, 244 So.2d 137 (Fla. 1971). Under these circumstances, Muehleman should not now be heard to argue that his absence at the charge conference prejudiced his case. We therefore find no basis for his claim that his absences violated his constitutional right to be present at trial.

Muehleman next contends that the trial court erred in admitting into evidence during the penalty phase a "Juvenile Social History Report" detailing his juvenile criminal record. We find no error. As we noted in Welty v. State, 402 So.2d 1159, 1163-63 (Fla. 1981), "[t]he trial court has wide discretion in areas concerning the admission of evidence, and, unless an abuse of discretion can be shown, its rulings will not be disturbed."

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First, the report's status as hearsay did not itself require exclusion from the jurors' consideration in the context of the penalty phase of a capital trial. § 921.141(1), Fla. Stat. (1985). Second, we once again affirm the proposition that the bottom line concern in questions involving the admissibility of evidence is relevance. Ruffin v. State, 397 So.2d 277 (Fla.), cert. denied, 454 U.S. 882 (1981); Ashley v. State, 265 So.2d 685 (Fla. 1972). The evidence became relevant when a psychiatric expert witness for the defense stated that he had considered the report in formulating his opinion. "[I]t is proper for a party to fully inquire into the history utilized by the expert to determine whether the expert's opinion has a proper basis." Parker v. State, 476 So.2d 134, 139 (Fla. 1985).

Finding no abuse of discretion, it is not the proper role of this Court upon appeal to reweigh questions of relevance and prejudice. We therefore reject this claim.

Muehleman next argues that the trial court erred in allowing three police officers to testify as to previous crimes he had committed in Illinois. He contends that the jury should not have heard of these crimes -- involving an assault on his mother, burglary, theft, and possession of drugs -- when the defense had waived the mitigating factor of "no significant history of prior criminal activity." § 921.141(6)(a), Fla. Stat. (1985); Maggard v. State, 399 So.2d 973 (Fla.), cert. denied, 454 U.S. 1039 (1981). Muehleman points to Maggard as requiring reversal and a new sentencing hearing.

In Maggard, we found reversible error in the state's presentation of extensive evidence of the defendant's prior criminal history when the defense had waived any reliance on the relevant mitigating factor. Noting that "[m]itigating factors are for the defendant's benefit, and the State should not be allowed to present damaging evidence against the defendant to rebut a mitigating circumstance that the defendant expressly concedes does not exist," 399 So.2d at 978, we found no proper basis for admission of the evidence.

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We find the instant case closer to Parker v. State, 476 So.2d 134 (Fla. 1985), than Maggard. In Parker, as in Maggard and the case at bar, the defendant had expressly waived any intention to rely upon the mitigating circumstance of no significant prior criminal history. In Parker, too, the trial court admitted evidence of prior crimes. The difference between Parker and Maggard is that in the former we found no error in the trial court's action.

We find this case controlled by Parker, in which the evidence was properly admitted in response to the extensive exploration by the defense of "appellant's past personal and social developmental history, including a prior criminal history." 476 So.2d at 139. The presentation of the previous crimes in Parker through cross-examination is functionally equivalent to the evidence here presented in rebuttal. In the instant case, unlike in Maggard, the trial court exercised its discretion in admitting the testimony not to rebut a phantom, waived mitigating factor, but to expose the jury to a more complete picture of those aspects of the defendant's history which had been put in issue. The testimony of Muehleman's assault on his mother, first, served to properly rebut, or at least supplement, extensive evidence presented by the defense focusing on the mother/son relationship and implying that his mother had indirectly caused the murder through lapses in Muehleman's upbringing. The trial court admitted the testimony concerning the other crimes in rebuttal to the defense's expert testimony, presented in mitigation, that Muehleman lacked substantial capacity to plan in advance and execute crimes.

Parker made clear that the mere existence of a strategical waiver by the defense of the mitigating factor does not end the analysis. In order to evaluate the alleged error, we must consider the evidence admitted, any prejudice accruing to the defendant therefrom, and the purpose for its admission. See Jennings v. State, 453 So.2d 1109, 1114 (Fla. 1984), cert. granted and judgment vacated on other grounds, 105 S.Ct. 1351 (1985). In light of the relevance of this evidence in rebutting

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specific evidence presented by the defense, we find no abuse of discretion in this case.

Muehleman similarly argues that the trial court erred in admitting the transcript of a taped interview of Richard Wesley, an acquaintance of Muehleman's who originally planned to participate in the murder. It is contended that the admission of the extremely prejudicial evidence, which clashed with Muehleman's testimony that he had only intended to rob the victim, violated his sixth amendment right to confront the witnesses against him. Bruton v. United States, 391 U.S. 123 (1968); Hall v. State, 381 So.2d 683 (Fla. 1978).

We noted in Hall that "[t]he crux of a Bruton violation is the introduction of statements which incriminate an accused without affording him an opportunity to cross-examine the declarant." 381 So.2d at 687. We find this language inapplicable, as the state offered to make Wesley available for cross-examination. The defense then strategically, and probably wisely, declined to accept this offer. Muehleman may not now argue that the lack of cross-examination violated his right of confrontation.

In his seventh argument on appeal, Muehleman argues that the trial court improperly restricted his presentation of evidence in mitigation, including the testimony of his grandmother, and limited evidence of Ronald Hewis' prior criminal history. Because fifteen witnesses testified as to Muehleman's character, and because the jury was informed of Hewis' criminal history, the evidence excluded would have been irrelevant and cumulative in nature. Its exclusion was therefore well within the trial court's range of discretion.

Muehleman next attacks certain remarks made during the prosecutor's closing argument which, he contends, improperly influenced the jurors' passions and resulted in prejudice to his case. We note at the outset that we agree with the state that precedent cited such as Goddard v. State, 143 Fla. 39, 196 So. 596 (Fla. 1940), and Harper v. State, 411 So.2d 235 (Fla. 3d DCA 1982), sheds little light on the instant issue. None of those

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cases involved the penalty phase of a capital trial. As we noted in Rush v. State, 461 So.2d 936, 941 (Fla. 1984), cert. denied, 106 S.Ct. 1237 (1986), "'the rule against inflammatory and abusive argument by a state's attorney is clear, each case must be considered upon its own merits and within the circumstances pertaining when the questionable statements were made.'" (quoting Darden v. State, 329 So.2d 287, 291 (Fla. 1976), cert. dismissed, 430 U.S. 704 (1977)).

The propriety of prosecutorial comments must be examined in context. A statement found out of place and prejudicial when made to a jury evaluating the defendant's guilt may quite properly bear on the aggravating circumstances set forth in section 921.141(5). Muehleman complains, for instance, of the prosecutor's characterization of the victim as a "feeble, sickly, 97-year-old man." Such a statement could indeed tend to excite passion in the jury. We cannot, however, rewrite on the behalf of the defense the horrible facts of what occurred or make the slaying appear to be less reprehensible than it actually was.

We find that the statements complained of were highly relevant in establishing the following aggravating factors: the commission of the murder during the course of a robbery, section 921.141(5)(d); its commission for the purpose of avoiding a lawful arrest, section 921.141(5)(e); the especially heinous, atrocious and cruel nature of the crime, section 921.141(5)(h); and its cold, calculated and premeditated nature, section 921.141(5)(i). In sum, we find no abuse of discretion in the trial court's supervision of the prosecutor's comments during the course of the trial. Teffeteller v. State, 439 So.2d 840 (Fla. 1983), cert. denied, 465 U.S. 1074 (1984).

Muehleman next attacks the jury instructions as given and the aggravating and mitigating circumstances found applicable to his case. We have carefully reviewed each of these contentions. They are without merit.

Finally, in a supplemental brief, Muehleman argues that our recent decision of Van Royal v. State, No. 66,144 (Fla. Sept. 18, 1986), compels us to now vacate Muehleman's sentence of death

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and demand for the imposition of a life sentence. We find the instant case readily distinguishable from Van Royal, in which we were forced to conclude from a number of circumstances that "this Court cannot assure itself that the trial judge based the oral sentence (of death) on a well-reasoned application of the factors set out in section 921.141(5) and (6) [, Florida Statutes (1981)] and in Tedder v. State, 322 So.2d 908 (Fla. 1975)," slip op. at 6, and find the death sentences in the case "unsupported." Id. In that case, the trial court's written findings overrode a jury recommendation of life, followed sentencing by over six months, and were filed only after the record on appeal had been filed with this Court. Although we once again vigorously stress that these written findings should be prepared contemporaneously with the imposition of sentence, we cannot find Van Royal determinative of this case. Here, the written findings followed the jury's recommendation of death, and were filed two and one half months after sentencing, two months prior to the certification of the record to this Court. As in Ferguson v. State, 417 So.2d 639, 641 (Fla. 1982), we hold that "[i]nasmuch as the supplemental record includes the trial judge's written findings this issue is now moot."

We therefore affirm Muehleman's conviction and the death sentence imposed.

It is so ordered.

McDONALD, C.J., and OVERTON and EHRLICH, JJ., Concur
SHAW, J., concurs specially with opinion
BARKETT, J., concurs specially with opinion

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

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SHAW, J., specially concurring.

The record here is not entirely clear, but it appears that the trial judge and counsel met prior to trial to consider a series of defense motions without summoning appellant to be present. One or more of these motions concerned the suppression of evidence. After approximately thirty to sixty minutes of arguments by counsel and rulings by the court, a recess was called to permit defense counsel to consult appellant. When the court reconvened shortly thereafter, appellant was present and heard the prosecutor comment that appellant had been absent earlier and had not waived his absence. Defense counsel replied that there was no problem. The trial court then proceeded to hear further argument and to receive testimony on the suppression of evidence. Under these circumstances I am satisfied that appellant ratified his earlier absence and that there was no error or, assuming there was error, it was harmless error.

I write to express my disagreement with the majority holding that a suppression hearing is not a crucial stage of the trial. The United States Supreme Court has recognized that "suppression hearings often are as important as the trial itself." Waller v. Georgia, 467 U.S. 39, 46 (1984). The case at hand is an apt illustration. 'After the trial judge denied the motions to suppress the evidence, appellant immediately changed his plea from not guilty to guilty. In short, the entire issue of guilt turned on the suppression issue and the suppression hearing was, in effect, the trial. The right of a defendant to be present at a suppression hearing is crucial to the right of confrontation. Normally, a suppression hearing consists of the state putting on witnesses and evidence to show that the police acted properly and there was no violation of the defendant's constitutional rights as, for example, in obtaining a confession, affecting an arrest, or conducting a search and seizure. More often than not, the defendant was present when the evidence was obtained and his presence at the suppression hearing may well be crucial to effective cross examination and representation by

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defense counsel. I am persuaded that appellant ratified his partial absence here and that the error was harmless; but, I reject the general notion that a suppression hearing is not a crucial stage of the trial.

As for the voluntariness of appellant's absence during part of the suppression hearing, the record is silent. Under Florida Rule of Criminal Procedure 3.180(b), "voluntary" is a word of art and is not used in the dictionary sense. It is limited to those instances where a defendant voluntarily absents himself without leave of court or is removed from court because of disruptive conduct. The record is silent but we should not assume that an absent defendant does not have leave of court to be absent or has been removed at the court's direction. I note here that court and counsel proceeded without appellant until they reached a point where it was necessary to consult appellant, whereupon a recess was taken and appellant was present shortly thereafter during the latter part of the hearing. A defendant charged with first-degree murder does not routinely come and go at will. The most logical explanation for appellant's early absence and later presence is simple: court and counsel chose to proceed initially without summoning appellant from his holding cell. The record is silent as to whether this was done with or without his knowledge.

I am also persuaded, contrary to the holding in Herzog v. State, 439 So.2d 1372 (Fla. 1983), on which the majority relies, that a defendant is required to be present during a pretrial suppression hearing by Florida Rule of Criminal Procedure 3.180(a)(3) and/or (6). Generically, a pretrial suppression hearing is a pretrial conference for the purpose of addressing evidence outside the presence of the jury to determine if the evidence should be introduced to the jury.

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BARKETT, J., specially concurring.

First, I agree with the position expressed by Justice Shaw in his concurring opinion except that I read the majority decision as holding only that the suppression hearing in this case was not a crucial stage of the proceedings. I do not read the majority opinion as establishing a rule that is applicable to all suppression hearings.

Second, I concur with the majority on the Van Royal issue only because the record reflects that the trial judge at the time of sentencing did engage in the requisite weighing process, albeit in a rudimentary fashion.

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An Appeal from the Circuit Court in and for Pinellas County,

Crockett Farnell, Judge - Case No. CRC8304924CFANO

James Marion Moorman, Public Defender and Robert F. Moeller, Assistant Public Defender, Bartow, Florida,

for Appellant

Jim Smith, Attorney General and Gary O. Welch and Frank J. Migliore, Jr., Assistant Attorneys General, Tampa, Florida,

for Appellee

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IN THE SUPREEM COURT OF FLORIDA

FRIDAY, MARCH 27, 1987

JEFFREY ALLEN MUEHLEMAN,	**	
Appellant,	**	CASE NO. 65,546
vs.	**	
STATE OF FLORIDA,	**	Circuit Court Case No. CRC8304924CFANO (Pinellas County
Appellee.	**	

Received By

MAR 30 1987

Appellate Division
Public Defenders Office

On consideration of the motion for rehearing filed by attorney for appellant,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

McDONALD, C.J., OVERTON, EHRLICH, SHAW, BARKETT, JJ., and ADKINS, J. (Ret.), Concur

On consideration of the motion for rehearing filed by attorney for appellee,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

McDONALD, C.J., EHRLICH, SHAW, BARKETT, JJ., and ADKINS, J. (Ret.), Concur
OVERTON, J., Dissents

A True Copy

SUPREME COURT OF THE STATE OF FLORIDA

e Court

cc: Hon. Karleen F. DeBlaker, Clerk
Hon. Crockett Farnell, Judge

Robert F. Moeller, Esquire
Gary O. Welch, Esquire

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reserve ruling on a motion or portion of a motion to suppress and can rule on that during the trial period.

I would merely point out the hazard of doing that is jeopardy has attached. As far as the Court is concerned, we have no objection to proceeding in that fashion.

THE COURT: No problem with doing it that way. The only thing I'm concerned about is voir dire and opening statements causing a problem.

MR. CROW: Obviously, I think it's going to be necessary to mention the confession to police and confession to Smart.

The situation of Rewis is somewhat different and he would have to be transported over here and perhaps we could see how long the testimony in the other thing is going to take and if it looks like we are putting Rewis on today and how we can handle. At present, maybe get the jury selected and get the officer on tomorrow.

THE COURT: That is where I see we are going.

MR. CROW: Maybe we can have Rewis available and if it looks like we can dispose of that and get Rewis done before then, go ahead and proceed and not delay that, assuming the Court doesn't grant the motion to suppress confession. That would put us in a different

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posture.

MR. McMILLAN: Judge, the facts regarding Mr. Rewis I attempted to lay forth in the motion. I don't know if there is really a factual dispute. I'm not alleging -- we are alleging at the time he took a taped statement, he was acting at the request of law enforcement, which would make him an agent and, therefore, under Florida Statutes allowing wire taps, would also release him of liability.

We are not alleging he was placed there as a plant originally. We are not alleging that he was originally operating under the direction of law enforcement.

THE COURT: Seems to me that releaves the necessity of testimony; does it not?

MR. CROW: I would think so, Judge.

There are more facts in our favor than that. I think, for instance, the statements were made on several -- three, four occasions to Mr. Rewis at a time prior to him having any contact with the detectives in the case. Had had over a twenty-day period numerous conversations, perhaps every day, with Mr. Muehleman and the conversation which led to the tape was not made in any way by law enforcement and not done at the direction of law enforcement.

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And after he fully confessed on three or four prior occasions to Rewis at the time they routinely come in contact at a break in the yard. The only thing the police did was put a bug on him, did not request him to engage in conversation. In fact, told him just the opposite. The only thing the police were involved in at all in this conversation's occurance was it was in any way, just as in the past without our participation or knowledge, is to have the evidence of it and that was, in essence, it.

On a couple of prior occasions, Mr. Muehleman was advised not only by Mr. Rewis but by a Detention Officer Jacobs that he should keep his mouth shut and not talk to anybody. The substance of the conversation is that he was asking for advice on various things and feeling out what the police knew about it.

Some additional facts, at some point, become relevant and if the Court is not inclined to agree on a factual basis, at some point, let us put it on the record for the Appellate Court and that would be fine with me.

And if you don't feel there are sufficient facts and they do not need to suppress and if it comes up on appeal and under 3.850, all of the facts would be

out.

MR. McMILLAN: If the State is basically proffering that as to the testimony of Mr. Rewis, we have no problem with that prof`er.

Just as far as clarification of the issue, I'm not sure whether Mr. Crow is maintaining a position that Mr. Rewis was or was not a law enforcement agent at the time of the taped interview.

Mr. Rewis testified and law enforcement testified consistent with what Mr. Crow indicated, that there was a series of conversations between these individuals. At some time, Mr. Rewis went to the detention center and put him in touch with the detective and Mr. Rewis told him what he knew and they then put a tape on him and he went and taped a conversation he had with Mr. Muehleman. Those were the facts.

MR. CROW: I'm conceding that he conceded to law enforcement to wear the bug but the conversation and the meeting was not arranged by law enforcement. It's something that would have occurred without any of their participation and, therefore, that is the distinction that has significance in the case law.

THE COURT: All right. I accept that.

You are also conceding he was, in fact, of

course, an agent of the law enforcement?

MR. CROW: I don't know that is the issue. As far as U.S. vs. Henry, Judge, I think the issue is the conversation was created or elicited by the State. I'm not conceding that. Agent is a word that can have a lot of meaning.

He was acting under the direction of law enforcement in wearing the tape. That would be the extent of it. In fact, it makes him an agent for that purpose and that would be a concession, that is what the facts would be.

MR. McMILLAN: Florida Statute on interception of communication makes it a felony. Interception on communication makes it a felony and except to the purpose of this case as law enforcement and the purpose of gathering evidence.

MR. CROW: That is not correct. Acting under the direction of law enforcement is the term I used.

MR. McMILLAN: And the purpose of the interception of communication is for the purpose of gathering evidence about a criminal episode.

MR. CROW: I draw a distinction between the recording and conversation, Judge. Lewis was advised, "Don't initiate any conversations. If he approaches, ask him about it."

THE COURT: Then, unless I'm not in tune with your thoughts and I think we are in agreement, it can be handled at a later point in the proceedings.

MR. McMILLAN: That's correct.

THE COURT: We are down to the arrest; are we not?

MR. CROW: Am I correct in indicating upon the facts we agree to there is no basis for suppression and what we will be doing later is supplementing the record for appeal and not to talk about this in voir dire or opening if I choose to do so?

MR. McMILLAN: Your Honor, are you making a finding you are accepting the proffer as if it were testimony?

THE COURT: Yes, I am.

MR. CROW: The only thing that that leaves us with are the issues on the statements to police officers and any issues we can limit through the waivers and voluntariness. If you want to do that, no problem.

Seems like they are saying there is something as to the legal communication between the arrest and, I guess, the May 8th situation where he invoked his right to remain silent.

THE COURT: Help me with the chronology again.

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

CRC83-04924CFANO-C

STATE OF FLORIDA :
:
VS. : FIRST DEGREE MURDER
:
JEFFERY A. MUEHLEMAN :

FILED
AUG 2 8 1984
KARLEEN F. De BLAKER
CLERK CIRCUIT COURT
Deputy Clerk

COURT'S FINDINGS AS TO AGGRAVATING AND MITIGATING CIRCUMSTANCES IN SUPPORT OF THE IMPOSITION OF THE DEATH PENALTY

The defendant, JEFFERY A. MUEHLEMAN, pled guilty to murder in the first degree of Earl Baughman. A jury was then impaneled and evidence presented in the penalty phase. After deliberation, the jury by a vote of 10 to 2 returned a recommendation to the Court to impose the death penalty. After weighing the aggravating and mitigating circumstances, and in accord with the jury's recommendation, the Court imposed the penalty of death upon the defendant, JEFFERY A. MUEHLEMAN.

AGGRAVATING CIRCUMSTANCES

1) This Court does now find that the aggravating circumstance of F.S. 921.141(5)(d) was established by the evidence to and beyond every reasonable doubt. The capital felony was committed while the defendant, JEFFERY A. MUEHLEMAN, was engaged in the robbery of Earl Baughman. The evidence clearly established beyond every reasonable doubt that between the evening of May 4, 1983, and the morning of May 5, 1983, the defendant robbed 96-year-old Earl Baughman by force and violence. According to the defendant's confessions, Mr. Baughman was struck on the head with a cast-iron skillet. Physical evidence from the scene indicates that as a result of these blows, the victim's dentures were knocked from his mouth and that bloodstains from the resulting injuries were left on the bed linen, wall, and curtains. Numerous items of property belonging to the victim were stolen by the defendant and found to be in his possession shortly after the murder, including money, a monogrammed cigarette lighter, and a

silver dollar dated 1886, the victim's year of birth. During this same incident, the defendant went on to manually strangle the victim using sufficient force to break the hyoid bone in the victim's throat. The victim finally died by asphyxiation when plastic newspaper bags were forced down his throat through the windpipe, blocking the flow of air to the lungs and depriving the brain of oxygen.

2) The Court further finds that the aggravating circumstance of F.S. 921.141(5)(e), that the murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody, was established beyond and to the exclusion of every reasonable doubt. In making this finding, the Court is aware of case law construing this factor which indicates that it applies to situations where a dominant motive of the homicide is to eliminate a witness to the crime who might later identify the perpetrator and subject him to prosecution. Routly v. State, 440 So2d 1257 (Fla 1983). The evidence in this case overwhelmingly establishes this to be the case.

Upon first taking the job of caring for the elderly victim, the defendant gave a false name. The day before the murder, the defendant sought the aid of an acquaintance (Richard Wesley) to assist him in committing the crime and disposing of the body. The evidence indicates that little force was actually necessary to accomplish the taking of property. The victim was 96 years old and asleep in the bedroom and his age and infirmity prevented him from offering serious physical resistance. The degree of force ultimately used on the victim and the determination of defendant to make sure the victim was dead far exceeded that necessary to commit the crime.

Detailed precautions were taken by the defendant to prevent the police from discovering the true fate of the victim. According to the defendant's statements, crumbs and a cup of beverage were planted at the table to make it appear the victim had eaten breakfast; the body was removed, placed in the trunk of the victim's vehicle and driven to another location where it was abandoned. The house was cleaned and wiped of prints; the victim's wallet burned in the backyard. The defendant told acquaintances that he intended to leave town the same day that he was ultimately stopped by the police and

arrested. During the defendant's initial untaped confession to the police, he told them that one of the reasons he killed the victim was because the victim might be able to identify him as his assailant.

3) The Court also finds that the aggravating circumstance of F.S. 921.141(5)(h), that the crime was especially heinous, atrocious or cruel, is established beyond and to the exclusion of every reasonable doubt. Case law construing this aggravating factor requires this Court to focus on the effect upon the victim himself to determine whether it is "the consciousless or pitiless crime which is unnecessarily torturous to the victim". State v. Dixon, 283 So2d 1 (Fla 1973). Even in circumstances where death was instantaneous, courts have upheld a finding of this factor where the victim experienced mental anguish and fear prior to the infliction of the fatal wounds. Routly v. State, 440 So2d 1257 (Fla 1983). In the instant case, death was not instantaneous.

The medical examiner testified that death by asphyxiation would normally result after minutes and unconsciousness may result within 30 - 60 seconds of constant strangulation. The physical pain, fear, and mental anguish experienced by the defenseless 96-year-old man are incalculable. The evidence indicates that the victim did suffer during the fatal assault, was conscious and did beg his assailant, the defendant, for mercy. The defendant's statement to the police, to Times reporter Christopher Smart, and to jail inmate, Ronald Rewis, indicate he struck repeated blows to the victim's head with a cast-iron frying pan. Although the blows did not kill the victim, and did not fracture any bones, they were of sufficient force to apparently knock out the victim's dentures and to splatter blood on the walls and curtains and to leave a substantial blood stain on the mattress and bed linens. Undoubtedly, these blows were sufficient to cause substantial pain and suffering to a victim who remained conscious and alive. According to the defendant's statements, he then proceeded to manually strangle the victim; the deterioration of the body prior to discovery made it impossible to calculate the tissue damage caused by this force, but it was clear that the force was great enough to fracture a bone in the neck and damage cartilage.

According to the defendant's own confession, the victim was alive and conscious during the assault; at one point, he reached up to the defendant and said words to the effect, "Jeff - Oh Jeff". Similarly, according to the defendant's statements to Ronald Rewis, the victim was conscious. According to the defendant's statements, he choked the victim for an "unbelievable amount of time" but he would not die. The victim's throat was too flexible for him to stop the passage of air to his lungs. This statement is consistent with the medical examiner's testimony that strangulation causes death by constricting the blood vessels in the neck and stopping the flow of oxygenated blood to the brain, not by blocking the throat and preventing the passage of air. When this failed to kill the victim, the defendant released his hold on the victim's throat, got plastic bags and returned to stuff them down the victim's throat. It is apparent from the defendant's statements that the victim was still alive and breathing at this point. The defendant, according to the medical examiner, would have had to use great force to overcome the gag reflex and insert his hand down the throat through the trachea and into the windpipe. When the defendant saw the bag was still inflating (and the victim still breathing) he stuffed the bags even further. According to his taped statement to Rewis, as could be heard on the tape, the victim was still struggling and moving around all over the bed as the bags were stuffed down his throat. The Court finds that this murder is especially wicked, willful, atrocious, and cruel.

5) The Court also finds that it was established beyond every reasonable doubt that the murder of Earl Buaghman was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, as set forth in F.S. 921.141(d)(5)(1). The evidence indicates that the defendant contemplated the commission of the murder well in advance of its commission. He had attempted to enlist a second person to help commit the crime and dispose of the body and followed through on his own when that person did not show up. The manner of commission of the murder displays strong determination to effect the victim's death. The proof in this case clearly demonstrates the crime was committed not only in a premeditated

manner, but one which was as well both cold and calculated. This established the higher type of premeditation necessary for this aggravating circumstance.

The Court is aware of the defendant's statements that he killed the victim out of "mercy", to prevent the victim from suffering after he had inflicted probable brain damage upon him with a cast-iron skillet. The Court specifically rejects this explanation as being overwhelmingly disproven by the evidence.

MITIGATING CIRCUMSTANCES

The jury was instructed on three mitigating circumstances: 1) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; 2) The age of the defendant at the time of the crime; and 3) Any other aspect of the defendant's character or record, and any other circumstances of the offense.

However, the Court has considered all statutory and non-statutory mitigating circumstances in reaching it's decision:

1) No significant history of prior criminal activity. This factor was specifically waived by the defense from being considered by the jury. The record before the Court is clear that the defendant does have a substantial record of criminal activity and, therefore, the Court finds this circumstance does not apply and was not supported by reasonably convincing evidence.

2) The crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance. There was no testimony which indicated that the defendant was operating under a disturbance sufficient in degree to have established this mitigating circumstance. Moreover, the evidence concerning the manner and means of commission of the crime as reflected by the physical evidence and statements of the defendant clearly indicate this circumstance was not applicable. The Court finds that this mitigating circumstance is not applicable nor is it supported by any reasonably convincing evidence.

3) The victim was a participant in the defendant's conduct, or consented to the act. The Court finds this circumstance is clearly inapplicable and is unsupported by any evidence.

4) The defendant was an accomplice in the offense for which he is to be sentenced, but the offense was committed by another and defendant's participation was relatively minor. All the evidence established the defendant acted alone in killing the victim. There is evidence that the defendant attempted to enlist another's (Richard Wesley's) aid, but that person did not actually show up or assist in the crime. The Court therefore finds that this circumstance is not applicable and is not supported by any reasonably convincing evidence.

5) The defendant acted under extreme duress or the substantial domination of another person. The Court finds this circumstance to be inapplicable and that it is not supported by any evidence.

6) The capacity of the defendant to appreciate the criminality of his conduct or to confirm his conduct to the requirements of law is substantially impaired. There is testimony from one defense psychiatrist that the defendant suffered from an "attention deficit disorder" which prevented him from appreciating the criminality of his conduct or conforming his conduct to the requirements of the law. This diagnosis differs from that reached by the other defense expert who also found that while some impairment was evidenced, it could not be termed "substantial". The Court also finds that the mitigating circumstance of "substantial" impairment is rebutted by evidence that the defendant planned to commit the crime in advance, tried to involve a second person in it, delayed commission of the crime until the victim was in bed and no other witnesses were present, and took meticulous steps to cover up the crime - all of which indicate he understood the criminal nature of his conduct and had the ability to conform his conduct to the law. When it suited his purpose, i.e. in getting the job, in dealing with associates and the police, and in dealing with the friends and relatives of the victim, the defendant demonstrated the capacity to control his conduct and delay his impulses to commit crime. The Court therefore finds in light of all the

evidence that this circumstance is not supported by reasonably convincing evidence.

7) The age of the defendant. The Court does find that the defendant's age at the time of the crime, 18, does constitute a mitigating circumstance. The Court does also determine that this mitigating circumstance is clearly outweighed by the four established aggravating circumstances.

8) Any other aspect of the defendant's character or record and any circumstance of the offense. The Court has also considered all the evidence presented to see if any non-statutory circumstances exist which in conjunction with defendant's age might outweigh the aggravating circumstances. Specifically, the Court has considered the psychiatric testimony as to the defendant's possible impairment, the testimony of relatives and friends concerning the defendant's troubled background and family life, his character and his past physical and emotional problems, previous opportunities and help offered to the defendant, and the testimony of jail officials as to his conduct within the jail system as well as the voluminous documents and other evidence presented by the defense.

The Court rules that there are no non-statutory mitigating factors.

The Court does, therefore, find that aggravating circumstances outweigh any and all mitigating circumstances and that the death penalty is the appropriate and legal penalty which the Court does impose on JEFFERY A. MUEHLEMAN.

DONE AND ORDERED in Chambers, Clearwater, Pinellas County, Florida, this 28th day of August, 1984.

Robert Farnell
CIRCUIT COURT JUDGE

Copies to:
State Attorney
Public Defender

CERTIFICATE OF SERVICE

I, DOUGLAS S. CONNOR, a member of the Bar of the Supreme Court of the United States and counsel of record for JEFFREY ALLEN MUEHLEMAN, the Petitioner, hereby certify that on May 20, 1987, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Motion for Leave to Proceed in Forma Pauperis on each of the parties as follows:

On the State of Florida, The Respondent, by depositing said copy in the United States Post Office, Bartow, Florida, with first class postage prepaid, properly addressed to Robert J. Landry, Assistant Attorney General, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602.

BY: Douglas S. Connor
DOUGLAS S. CONNOR
Assistant Public Defender

Supreme Court, U.S.
FILED
MAY 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

86-7066

CERTIFICATE OF SERVICE

I, DOUGLAS S. CONNOR, a member of the Bar of the Supreme Court of the United States and counsel of record for JEFFREY ALLEN MUEHLEMAN, the Petitioner, hereby certify that on May 20, 1987, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of Florida with attached Appendix on each of the parties as follows:

On the State of Florida, The Respondent, by depositing said copy in the United States Post Office, Bartow, Florida, with first class postage prepaid, properly addressed to Robert J. Landry, Assistant Attorney General, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33802.

BY: Douglas S. Connor
DOUGLAS S. CONNOR
Assistant Public Defender

OPPOSITION BRIEF

ORIGINAL (3)

Case No. 86-7066

RECEIVED
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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY ALLEN MUEHLEMAN,

Petitioner,

v.

STATE OF FLORIDA

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI IN THE SECOND DISTRICT COURT OF APPEAL

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

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COUNSEL FOR RESPONDENT

/tms

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OPINION BELOW

The opinion of the Second District Court of Appeal sought to be reviewed is reported as Muehleman v. State, 503 So.2d 310 (Fla. 1987).

STATEMENT OF FACTS

Muehleman initially approached Rewis and made repeated attempts to discuss the details of the crime with Rewis. Rewis initially attempted to dissuade Muehleman "from talking too much". Thereafter, Rewis approached a corrections officer, who in turn placed Rewis in contact with law enforcement officers. Rewis consented to being equipped with a recording device. Rewis was instructed not to initiate any conveersation with Muehleman. Rewis' efforts were not induced by law enforcement. Muehleman v. State, 503 So.2d 310 (Fla. 1987).

ARGUMENT

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI.

The instant cause involves neither an informant which acted in a manner so as to induce the petitioner to speak about the crime or tactics by state officials designed to elicit statements (such as compensation to informants who obtain incriminating statements). Sub judice, the sole strategy was to preserve that which was voluntarily made without inducement; not to induce and record incriminating statements. As such, petitioner's reliance on Maine v. Moulton, 474 U.S. ___, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985) and United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980) is inappropriate. This point was recognized in United States v. Vitale, 728 F.2d 1090, 1092 (8th Cir. 1984) and this Court denied certiorari; Vitale v. United States, 105 S.Ct. 103 (1984). As this Court noted in Kuhlmann v. Wilson, 106 S.Ct. 2616 at 2630, n. 12 (1986): a defendant must show state action "designed deliberately to elicit incriminating remarks". The facts found by the state court are contrary to this. Muehleman v. State, 503 So.2d 310 (Fla. 1987). To the

extent that the petitioner differs with facts found in state court, his claim would be more appropriate to a habeas corpus petition in Federal District Court. Certiorari in this Court would be a waste of this Court's scarce resources.

Assuming arguendo that the issue is of the magnitude to warrant this Court's review, the instant case is not of that magnitude since any error of constitutional proportions is harmless and the judgment below is valid in light of the peitioner's contemporary confession to a newspaper reporter who was not a government agent, the corroborating tangible evidence and the petitioner's plea of guilty.

CONCLUSION

Based on the above argument and authorities, the respondent respectfully submtis that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

GARY O. WELCH
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(813) 272-2670

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. regular mail to Douglas S. Connor, Assistant Public Defender, Hall of Justice Building, 455 North Broadway Avenue North, P. O. Box 1640, Bartow, Florida 33830, this 24th day of July, 1987.

OF COUNSEL FOR RESPONDENT.

OPINION

SUPREME COURT OF THE UNITED STATES

JEFFREY ALLEN MUEHLEMAN v. FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 86-7066. Decided October 5, 1987

The petition for a writ of certiorari is denied.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant the petition for a writ of certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would vacate the judgment of the Florida Supreme Court insofar as it left undisturbed the sentence of death imposed in this case. But even if I did not hold this view, I would grant this petition for writ of certiorari in order to clarify the relationship between several recent precedents of this Court. Our opinions in *United States* v. *Henry*, 447 U. S. 264 (1980), *Maine* v. *Moulton*, 474 U. S. 159 (1985), and *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986), all examined the circumstances in which the police may, consistent with the Sixth Amendment, obtain incriminating statements from an accused through an informant. We found Sixth Amendment violations in *Henry* and *Maine*, but not in *Kuhlmann*, relying on the slightly different factual circumstances of the cases. These divergent rulings create a potential for misunderstanding when other courts seek to interpret them, as the Florida Supreme

Court's opinion in this case demonstrates. We should grant certiorari to resolve the uncertainty created by our own holdings.

I

On May 2, 1983, 96-year-old Earl Baughman hired petitioner, 18-year-old Jeffrey Allen Muehleman, as a "helper." On May 4, petitioner took Baughman to the bank to cash his social security check. On May 5, Baughman and his 1961 Cadillac were reported missing. The following day, sheriff's deputies of Pinellas County, Florida, detained petitioner to ask him about the disappearance. Petitioner told a deputy that his name was "Ed Buchanan." He was then arrested for obstructing justice by giving false information, an offense later declared unconstitutional by the Florida Supreme Court in *Bunnell* v. *State*, 453 So. 2d 808 (Fla. 1984). Petitioner waived his *Miranda* rights and gave a statement that included his true name and a confession to taking some small items without Baughman's permission. Petitioner denied, however, any involvement in Baughman's disappearance. After Baughman's body was found in the trunk of his Cadillac on a St. Petersburg, Florida street, the police again interviewed petitioner at the maximum security county jail facility where he was being held. Petitioner continued to deny any involvement in Baughman's death.

While he was in the Pinellas County Jail, petitioner came into contact with Ronald Rewis, who was awaiting sentence on a felony conviction. According to Rewis, petitioner confessed in detail to the murder of Baughman during unsolicited conversations with Rewis in the jail laundry where both inmates worked. Rewis, who had provided information to correctional officials on at least two previous occasions, then contacted a correctional official who put him in touch with the detectives investigating Baughman's disappearance and death. The detectives told Rewis to let them know if petitioner said anything else and persuaded him to wear a wire to get a tape of petitioner's confession. Rewis then taped a

conversation with petitioner in the recreation yard. On the tape, Rewis asked petitioner why he did not merely take the old man's money, to which petitioner responded that he had planned all along to kill the man. Pet. for Cert. 8. When Rewis asked petitioner whether the killing bothered him, petitioner responded "no" and laughed. *Ibid.* Although Rewis was not paid for his cooperation with the investigation, one of the detectives agreed to appear at Rewis's sentencing hearing, at which he received a much lighter sentence than that recommended by the prosecutor.

The detectives, tape in hand, interviewed petitioner again. Petitioner initially continued to deny his involvement with the crime, but when confronted with the evidence against him, including the statements taped by Rewis, petitioner admitted killing Baughman and gave a detailed statement. The detectives then booked petitioner on charges of first-degree murder.

Petitioner filed a pretrial motion to suppress his statements to Rewis and his subsequent confession. When his suppression motion was denied, petitioner entered a plea of guilty. At a penalty trial before a jury, petitioner continued to object to the admission of Rewis's testimony and the tape Rewis had made. During closing argument, the prosecution played a portion of the tape and argued that petitioner's laughter when asked about the murder supported imposition of the death penalty. By a vote of 10 to 2, the jury recommended that petitioner be sentenced to death, and the trial court so sentenced him. On appeal, petitioner raised a host of challenges to his conviction and sentence, all of which were rejected by the Florida Supreme Court. *Muehleman* v. *State*, 503 So. 2d 310 (Fla. 1987). In his petition for a writ of certiorari, petitioner focuses solely on the government's use of Rewis to obtain incriminating statements from him while he was in jail.

II

We first considered the problem of the inmate informant in *United States* v. *Henry*, *supra*. We held that Henry's right to counsel was violated when the government used a paid informant's testimony regarding incriminating statements made by Henry while he was jailed awaiting trial. Three factors convinced us that the government had overstepped the bounds of the Sixth Amendment. First, the informant was paid a contingent fee for information he obtained. Second, Henry was unaware that his confidant was in fact a government informant. Third, Henry's incarceration imposed psychological pressures that rendered him "particularly susceptible to the ploys of undercover Government agents." *Id.*, at 274. We concluded that "[b]y intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel." *Ibid.*

In *Maine* v. *Moulton*, *supra*, we applied the analysis developed in *Henry* to a situation outside of the jailhouse setting. We held that Moulton's right to counsel was violated when the government made a deal with his codefendant in which the codefendant would surreptitiously record Moulton's statements in return for a favorable plea bargain. The government wired the codefendant when he attended an all-day meeting with Moulton, at Moulton's request, to plan their common defense. We rejected the argument that Moulton's initiation of the meeting exonerated the government from any wrongdoing. We held that "the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." 474 U. S., at ——.

In *Kuhlmann* v. *Wilson*, *supra*, decided the same Term as *Maine*, we returned to the jailhouse setting. Wilson was incarcerated pending trial and placed in a cell with a prisoner who had previously agreed to act as a government informant.

The government instructed the informant only to listen to Wilson's comments and not to ask any questions. The informant complied with this directive. We held that the informant in this case played the constitutionally permissible role of a mere "listening post." *Kuhlmann* v. *Wilson*, *supra*, at —— n. 19. We found that this fact distinguished *Kuhlmann* from *Henry* and *Maine*, concluding that "the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." 477 U. S., at ——.

In the instant case, the state of Florida, in opposition to the petition for writ of certiorari, urges that the facts found by the state court demonstrate that this case falls within *Kuhlmann*'s exception to the doctrine enunciated in *Henry* and *Maine*. The Florida Supreme Court found four facts on which it based its Sixth Amendment holding. First, petitioner was "apparently eager to talk" and initially approached Rewis to discuss the crime with him. Second, Rewis approached the authorities on his own initiative. Third, the authorities instructed Rewis not to question petitioner. Fourth, Rewis was not promised any form of compensation for his cooperation. See *Muehleman* v. *State*, *supra*, at 314.

A careful reading of our precedents, however, demonstrates that these facts do not suffice to shield the government from Sixth Amendment challenge in this case. First, we explicitly rejected in *Maine* the notion that the defendant's initiation of contact with the informant is relevant to the Sixth Amendment issue. *Maine* v. *Moulton*, *supra*, at ——. Second, the fact that Rewis initially approached the authorities is insignificant given that the authorities suggested that he be wired. In *Maine*, we found it compelling that "the police asked [the informant] to let them put a body wire transmitter on him to record what was said." 474 U. S., at ——. Third, the mere fact that Rewis was *instructed* not to ask petitioner questions cannot bring this case into the ambit of

Kuhlmann, because an identical instruction was given to the informant in *Henry*. See *United States* v. *Henry*, *supra*, at 266. What we found compelling in *Kuhlmann* was not merely that the informant was instructed to remain silent, but that he actually did so. It is undisputed in the instant case that Rewis asked petitioner crucial questions concerning why he had killed Baughman and how he felt about it. Pet. for Cert. 8. Finally, the lack of monetary compensation offered Rewis cannot distinguish this case from our contrary holdings. Although the informant in *Henry* was paid a contingent fee, there is no suggestion that the informant in *Maine* was offered anything other than a favorable plea bargain. The favorable sentencing treatment afforded Rewis in this case is along much the same lines. In sum, none of the facts found by the Florida court successfully distinguishes this case from *Henry* and *Maine*. As I read our precedents, *Kuhlmann* represents the only exception that we have yet recognized to the prohibition established in *Henry* and *Maine*, and that exception may be invoked only in cases in which the informant can truly be described as a mere "listening post." This is not such a case.

III

Although I think that the Florida Supreme Court misread our precedents in rejecting petitioner's Sixth Amendment claim, its error is one that is lamentably easy to make. Our precedents in this area involve several factual scenarios that vary only slightly. We have given little guidance on which factual variations are relevant to or dispositive of Sixth Amendment claims. We owe it to law enforcement officials and the courts to establish clearly the line across which constitutional error lies. For that reason, we should grant this petition for certiorari.